IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 233 Miscellaneous

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

Ex Parte JESSIE A. KILPATRICK,

Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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December 3, 1948.

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Statement

By his motion for leave to file a petition for a writ of mandamus directed to the Honorable John C. Knox, United States District Judge for the Southern District of New York, or a petition for a writ of certiorari to the United States District Court for the Southern District of New York, petitioner seeks to have this Court review an order of the United States District Court for the Southern District of New York entered on November 22, 1948. This

order (Appendix to Petition, pp. iii-iv) denied the petitioner's motion for a trial preference in an action brought under the provisions of the Federal Employers' Liability Act (45 U. S. C. A. §§51-60), and granted, in the exercise of the Court's judicial discretion, the respondent's cross-motion to transfer the trial of this action to the United States District Court for the Northern District of Texas, Fort Worth Division. The petitioner's complaint states that he is a resident of nearby Big Spring, Texas, where the accident occurred which gave rise to this action to recover damages in the sum of $300,000.

The petitioner seeks to invoke this Court's jurisdiction directly. He has neither appealed this order to the Court of Appeals for the Second Circuit, nor petitioned that Court for a writ of mandamus directed to Judge Knox.

Grounds of Respondent's Opposition to the Motion

Respondent opposes this motion on the following grounds:

1. The petitioner's contentions with respect to the exclusion of Federal Employers' Liability Act cases from the scope of §1404(a) of Title 28, United States Code, are clearly lacking in merit.

2. Petitioner has made no prior application for the same relief to the Court of Appeals for the Second Circuit.

3. There is no element of such vital public importance as to warrant this Court in exercising its discretion in petitioner's favor.

4. This Court lacks jurisdiction to grant the relief requested, for clearly the most that the petition shows

is error in the exercise of conceded judicial power, not usurpation of judicial power by the District Court.

5. The power of this Court is sought to be invoked, not in aid of its appellate jurisdiction, but only as a substitute for an appeal not permitted by statute.

ARGUMENT

POINT I

The petitioner's contentions with respect to the exclusion of Federal Employers' Liability Act cases from the scope of Section 1404(a) of Title 28, United States Code, are clearly lacking in merit.

It is doubtful, to say the least, whether the Court has jurisdiction to pass upon this motion (*infra* pp. 10-13). However, respondent turns first to the question whether §1404(a) of Title 28, United States Code, embraces an action brought under the provisions of the Federal Employers' Liability Act (45 U. S. C. §§51-60).

For the purposes of this motion, and in the interest of brevity, respondent will stand upon the scholarly and lucid opinions by Judge Kaufman in *Nunn* v. *Chicago, Milwaukee, St. Paul and Pacific R. Co.* (S. D. N. Y., November 9, 1948, Appendix to Petition pp. vi-xiv), and by Judges Nordbye and Joyce in *Hayes* v. *Chicago Rock Island and Pacific R. Co.*, 79 F. Supp. 821 (D. C. Minn. September 25, 1948), relied upon by Judge Knox in the instant case.

Respondent presented to Judge Knox on the argument of this motion below certain legislative source material concerning §1404(a), not called to the attention of either Judges Nordbye, Joyce, Kaufman or Rayfiel, which clearly shows the intention of Congress that the statutory phrase

"any civil action" includes a civil action brought under the Federal Employers' Liability Act.

Appended to the report on the revised code submitted by the Committee on the Judiciary of the House of Representatives (H. Rept. No. 308, 80th Cong. 1st Session, April 25, 1947) were the reviser's notes to each section together with accompanying tables. "These [notes] explain in great detail the source of the law and the changes made in the course of the codification." S. Rept. No. 1559, 80th Cong., 2d Session, June 9, 1948, p. 2. The reviser's note to Section 1404(a) states that the section was drafted "in accordance with the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper." "As an example of the need of such a provision," the reviser specifically cited *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, "which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio."

The reference to this Court's opinion in the *Kepner* case is not accidental. In fact, the history of the reviser's note conclusively shows that §1404(a) was designed to give a district court the discretion to transfer in precisely the situation presented in that case.

The Second Draft of the Code, together with the reviser's notes thereto, was circulated by the reviser during the spring of 1945 to the Advisory Committee, the Judicial Conference Committee, the Judicial Consultant, Judge Parker, and the Special Consultants, Judge Holtzoff and Professor James W. Moore, as well as to every member of the legislature and the Federal judiciary. The members of the committees, together with the consultants and the revision staff, met at Hershey, Pennsylvania for three days at the end of May, 1945 to consider this draft "section by section," to discuss "all the questions which had arisen in

the course of their preparation," and to reach decisions "for the guidance of the staff in the further revision of the drafts." In addition to eminent advisory committees, "Prof. James W. Moore, author of Moore's Federal Practice and Chairman Eugene J. Keogh of the House Committee on Revision of the Laws made important contributions to the discussions. Our committee can attest to the extremely thorough and full consideration which was given by this advisory group to every doubtful point which arose in the court [sic] of the work." (Statement of Hon. Albert B. Maris, United States Circuit Judge for the Third Circuit, at hearing before Subcommittee No. 1 of the House Judiciary Committee, March 7, 1947, 28 United States Code Congressional Service, p. 1958.)

The language of Section 1404(a) in this Second Draft was similar to that finally enacted by Congress, but the reviser's note was somewhat different. It read then as follows:

> "Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper. The author gave as an example for the need of such a provision *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

Professor Moore has kindly furnished counsel with a copy of the memorandum referred to, in which he wrote to the reviser with reference to the doctrine of *forum non conveniens*:

> "Improper venue results in the dismissal of an action in the federal courts if the point is timely made. I think this result can no longer be justified in this era of easy communication and travel. Provision should be made for transfer when an objection of improper venue is sustained, probably with the imposition of costs and possibly a reasonable attorney's fee. Then I believe we should go further and give some recognition to the doctrine of *forum non conveniens* and permit a court to transfer the case, even though the venue is proper, to a more convenient forum. In my opinion the District Court for the Eastern District of New York should have had the power in the situation presented in the *Kepner* case, 314 U. S. 44, 62 S. Ct. 6, to transfer the action under the Federal Employer's Liability Act to a federal court in Ohio where the accident occurred and the employee resided and which would have been a proper venue."

In Volume 3, *Moore's Federal Practice* (*Second Edition*), published December, 1948, there is an extensive discussion of §1404(a) which the author concludes as follows (§19.04, p. 2141):

> "The Judicial Code Revision did not change the underlying basic principles of venue. It did, however, make some substantial changes and certainly put venue on a more workable basis. It adopts the principle of forum non conveniens, but provides for a transfer, not dismissal, of *any* action to a proper and more convenient forum."

In a footnote to this text, Professor Moore states (p. 2141, note 107):

> "*Any* action in §1404(a) includes suits subject to special venue statutes, as suits for patent infringement and suits under the Federal Employers' Liability Act, as well as actions subject to the general venue statute."

This explanation of the reference to the *Kepner* case in the reviser's note, together with the fact that the clear and unambiguous language of §1404(a) stood untouched throughout three years' consideration of the code revision by Congressional groups and expert advisory committees, is indicative of the legislative intent that this new statute should include within its scope civil actions brought in the district courts under the Federal Employers' Liability Act (*United States* v. *National City Lines, Inc.*, 334 U. S. 573, 596-7).

POINT II

Petitioner has made no prior application for the same relief to the Court of Appeals for the Second Circuit.

Conceding merely for purposes of argument that this Court would have jurisdiction under §1651(a) of Title 28, United States Code, to grant this motion for leave to file a petition for a writ of mandamus or certiorari, petitioner's motion, made prior to any application in the Court of Appeals for the Second Circuit, should be denied. The correct rule is stated in *Ex Parte Peru*, 318 U. S. 578 (at p. 584):

> "And ever since the statute vested in the circuit courts of appeals appellate jurisdiction on direct appeal from

the district courts, this Court, in the exercise of its discretion, has in appropriate circumstances declined to issue the writ to a district court, but without prejudice to an application to the circuit court of appeals (*Ex parte Apex Mfg. Co.*, 274 U. S. 725; *Ex parte Daugherty*, 282 U. S. 809; *Ex parte Krentler-Arnold Hinge Last Co.*, 286 U. S. 533), which likewise has power under §262 of the Judicial Code to issue the writ. *McClellan* v. *Carland*, 217 U. S. 268; *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269."

While it is true that in the *Peru* case this Court entertained a motion for leave to file a petition for a writ prior to application in the Court of Appeals, the late Chief Justice Stone made it clear that it was only the public importance and exceptional character of that claim of sovereign immunity which called for the exercise of the Court's discretion to issue the writ, rather than to relegate a friendly sovereign power the court of appeals. There, the clash between the executive branch of the government which had certified sovereign immunity, and the judicial branch which had refused to recognize the certification, required action by this Court. Obviously, no such extraordinary circumstances are presented here.

In *United States Alkali Export Association, Inc.* v. *United States*, 325 U. S. 196 and *De Beers Consolidated Mines Ltd.* v. *United States*, 325 U. S. 212, suits in equity by the United States under §4 of the Sherman Act (15 U. S. C. §4), this Court entertained petitions for writs of certiorari to the district court in the first instance because sole appellate jurisdiction lay in this Court under §29 of the Act (15 U. S. C. §29). Therefore, it was said in the *Alkali Export Association* case that "application for a common law writ in aid of appellate jurisdiction must be

to this Court" (*supra*, p. 202). The late Chief Justice Stone, however, reaffirmed the rule of *Ex Parte Peru*, as applicable to all cases of which this Court does not have *sole* appellate jurisdiction (*ibid.*):

> "In the usual case this Court will decline to issue a writ prior to review in the Circuit Court of Appeals, whether by ordinary appeal, *In re Tampa Suburban R. Co.*, 168 U. S. 583, 588, or by an extraordinary remedy, see *Ex parte Peru, supra*, 584."

POINT III

There is no element of such vital importance as to warrant this Court in exercising its discretion in petitioner's favor.

Again assuming this Court's jurisdiction, the petitioner's motion for leave to file a petition for a common law writ directed to the Honorable John C. Knox, United States District Judge for the Southern District of New York, should be denied upon the ground that the petitioner does not show that he is entitled to the relief requested.

Obviously, the only effect of this order of transfer is that the petitioner will present his cause of action for damages to a federal court and jury in Fort Worth, Texas, rather than to a court and jury in New York City. It is hard to see how the petitioner will be prejudiced in any legal sense by this transfer; in fact, he may be able to subpoena necessary witnesses for a trial in Fort Worth, Texas, whose presence he could not secure at a trial in New York City. In any event, the petitioner's motion does not present "a really extraordinary cause" which would entitle him to the drastic and extraordinary remedy sought herein (*Ex Parte Fahey*, 332 U. S. 258, 260).

POINT IV

This Court lacks jurisdiction to grant the relief requested, for clearly the most that the petition shows is error in the exercise of conceded judicial power, not usurpation of judicial power by the District Court.

The petitioner must base his application for the drastic and extraordinary remedy sought by this Petition upon the assertion that the order of transfer entered in the District Court was "beyond the power of the District Judge" (Petition, p. 6), his contention being "that the court has no judicial power to do what it has done and that its action was not merely error but a usurpation of power."

However, the petitioner also argues that §1404(a) of Title 28, United States Code, effective September 1, 1948, giving discretion to a district court to transfer "any civil action," for the convenience of parties and witnesses, and in the interest of justice, to any other district where it might have been brought, has no application whatsoever to a civil action brought under the Federal Employers' Liability Act (Brief pp. 14-15). Thus, the legal principles excluding the application of the doctrine of *"forum non conveniens"* to such cases are said not to have been altered in any way by the new statute. Yet, prior to September 1, 1948, the effective date of the new statute, it must be conceded that Judge Knox would have had the *judicial power* to dismiss this action on the ground of *forum non conveniens*, even though his decision would have been erroneous (*Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 505, and cases cited therein). Therefore, it is quite obvious that the petitioner's complaint is not connected with usurpation of judicial power by the District Court, but merely with an alleged misconstruction of the statute in the exercise of conceded judicial power.

Accordingly, this Court lacks jurisdiction, and the extraordinary relief requested should be denied upon this ground alone (*Ex Parte Chicago R. I. & Pac. Ry. Co.*, 255 U. S. 273, 279-80; *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 26-32; *United States Alkali Export Association, Inc.* v. *United States*, 325 U. S. 196, 202).

POINT V

The power of this Court is sought to be invoked, not in aid of its appellate jurisdiction, but only as a substitute for an appeal not permitted by statute.

Section 1651(a) of Title 28, United States Code states that this Court and all courts established by Act of Congress may issue all writs:

> "* * * *necessary or appropriate in aid of their respective jurisdictions* agreeable to the usages and principles of law."

The statutory authority of this Court to issue writs of mandamus or certiorari to district courts can be constitutionally exercised only in so far as such writs are in aid of its appellate jurisdiction. (*Ex Parte Peru*, 318 U. S. 578, 582.) This Court also has power to issue the writ, even though direct appellate jurisdiction is vested in the court of appeals, if this Court has ultimate discretionary jurisdiction by certiorari (*Ex Parte Peru, supra*, at pp. 584-5).

These rules do not cover the exercise of this Court's jurisdiction in the instant case, for the Court of Appeals for the Second Circuit is not vested by statute with direct appellate jurisdiction over this order of transfer. Therefore, this Court has no power to act in aid of an appellate jurisdiction that likewise could not exist.

The order entered herein by the district court merely transfers the trial of this action to Texas. The order is

not final in any respect, as regards the merits of the case. In petitioner's view, the "matter involved lies outside the issues of the case" (Petition, p. 5). We believe that the Court of Appeals for the Second Circuit would be without appellate jurisdiction, since it may only review, with exceptions not here material, "appeals from all final decisions" of the district courts, except where a direct review may be had in this Court (28 U. S. C. §1291; cf. *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 29-30).

The non-appealability of this type of transfer order was recognized recently by this Court in *United States* v. *National City Lines, Inc.*, 334 U. S. 573. Commenting upon a previous order of transfer which had been entered upon defendants' motion in a companion criminal anti-trust suit, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, Mr. Justice Rutledge said (at p. 594):

> "Moreover, it is at least doubtful whether the Government had a right to appeal from the order of transfer in the criminal case.[43]"

Consequently, the petitioner is merely attempting to prevail upon this Court to "substitute mandamus for an appeal contrary to the statutes and the policy of Congress." *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 32. As the late Chief Justice Stone wrote for a unanimous Court in the *Roche* case (p. 30):

> "Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Con-

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"43 The precise point apparently has not arisen since the adoption of Rule 21(b), but there would seem to be no statutory basis for an appeal from an order of this type. See 18 U. S. C. A. §682. See also *Semel* v. *United States*, 158 F. (2d) 231, 232."

gressional policy against piecemeal appeals in criminal cases. *Cobbledick* v. *United States*, 309 U. S. 323. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review. 'The effect therefore of this mode of interposition would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times before there could be a final judgment.' *Bank of Columbia* v. *Sweeney*, 1 Pet. 567, 569. See also *Life & Fire Insurance Co.* v. *Adams*, 9 Pet. 573, 602; *Ex parte Hoard*, 105 U. S. 578, 579-80; *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 379."

CONCLUSION

The petitioner's motion for leave to file a petition for a writ of mandamus to the Honorable John C. Knox, United States District Judge for the Southern District of New York, should be denied; the alternative motion for leave to file a petition for a writ of certiorari to the United States District Court for the Southern District of New York should be denied.

Dated: New York, N. Y., December 3, 1948.

Respectfully submitted,

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